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CHARLES ELMORE
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 440

THE OHIO OIL COMPANY,

Appellant,

versus

E. A. CONWAY, SUPERVISOR OF PUBLIC ACCOUNTS OF THE STATE OF LOUISIANA,

Appellee.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

JURISDICTIONAL STATEMENT FOR APPELLANT.

S. L. HEROLD,
S. P. COUSIN,
R. L. BENOIT,
Solicitors for Appellant.

MONTGOMERY-ANDREE PRINTING CO. INC...430-432 CHARTRES, N.O.

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JURISDICTIONAL STATEMENT FOR APPELLANT.

This is an appeal from a decree on final hearing dissolving the preliminary injunction directed by this Court on March 5, 1929 *(Ohio Oil Company v. Conway, 279 U.S., 813, No. 514, October Term, 1928)*. The decree here ap-

pealed from was signed and entered on August 9, 1929 (R._____). This appeal was allowed, and the injunction continued in effect pending the appeal, by order of the three-judge Court on August 20, 1929 (R._____).

This Court has already held that it had jurisdiction of the appeal from the order refusing the preliminary injunction, under Section 380, Title 28, of the United States Code. The present appeal being from the judgment rendered on final hearing in the same cause, the same statutory provision vests jurisdiction in this Court.

Respectfully submitted,

S. L. HEROLD,
S. P. COUSIN,
R. L. BENOIT,
Solicitors for Appellant.

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ORIGINAL BRIEF FOR APPELLANT.

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SUBJECT INDEX.

Page

STATEMENT OF THE CASE 2

ASSIGNMENT OF ERRORS 6

STATEMENT OF POINTS TO BE RELIED UPON 9

SUMMARY OF ARGUMENT 10

ARGUMENT 11

POINT I. **Act 5 of 1928 is void, because it denies the plaintiff the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States** 11

(a) **The statute operates a systematic and oppressive discrimination against the appellant** 11

(b) **The discrimination effected by the statute rests upon no reasonable basis of classification** 19

I. **A tax according to gravity is unreasonable and arbitrary** 19

2 ~~(b)~~ **The classification according to the statute is unreasonable and arbitrary** 32

THE REASONS ASSIGNED BY THE DISTRICT COURT FOR ITS JUDGMENT 39

SUBJECT INDEX—*(Continued)*

Page

POINT II. **Act 5 of 1928 of the Louisiana Legislature is void as in conflict with Section 21 of Article X of the Constitution of Louisiana** 43

(a) **The severance tax imposed by the statute in question is levied neither according to quantity nor to value** 43

(b) **Whatever of classification is attempted by the act is arbitrary and unreasonable** 45

TABLE OF CASES.

Page

Airway Elec. App. Corp. v. Day, 266 U. S. 71 ..... 30, 39
Atchison, T. & S. F. R. Co. v. Love, 185 Fed. 321, 329 26
Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237 30
Chicago Union Trac. Co. v. Raymond, 207 U. S. 20, 36 30
Choctaw, Okla. & G. R. Co. v. Harrison, 235 U. S. 290 28
Coleman, Louisville Gas & Elec. Co. v., 277 U. S. 32, 37 ..... 26, 29, 30
Conway, Ohio Oil Co. v., 279 U. S. 813, 34 Fed. (2nd) 47 1
Dakota County, Sioux City Bridge Co. v., 260 U. S. 441, 445 30
Dawson v. Kentucky Dist. Co., 255 U. S. 288, 296 .. 43
Day, Airway Elec. App. Co. v., 266 U. S. 71, 80 .... 30, 39
Dist. of Columbia, Martin v., 205 U. S. 135, 139 30
Green, Southern Ry. Co. v., 216 U. S. 400, 412 41
Gulf Ref. Co. v. McFarland, 154 La. 251, 264 U. S. 573 ..... 2, 28, 44
Harrison, Choctaw, Okla. & G. R. Co. v., 235 U. S. 290 28
Hopkins, Yick Wo v., 118 U. S. 369 41
Kentucky Dist. Co., Dawson v., 255 U. S. 288, 296 .. 43
Lord, Oliver Mining Co. v., 262 U. S. 172, 176 28
Louisiana Constitution, Art. X, Sec. 21 ..... 27, 43
Louisiana Statute, Act 5 of 1928, Appendix 1 47
Louisville Gas & Elec. Co. v. Coleman, 277 U. S. 32, 37 ..... 26, 29, 30
Louisville Trust Co. v. Stone, 107 Fed. 305 30
Love v. Atchison, T. & S. F. R. Co., 185 Fed. 321, 329 26

TABLE OF CASES—*(Continued)*

Page

McFarland, Gulf Ref. Co. v., 154 La. 251, 264 U. S. 573 ..... 2, 28, 44

Martin v. Dist. of Columbia, 205 U. S. 136, 139 30

N. C. & St. P. R. Co. v. Taylor, 86 Fed. 168 30

Ohio Oil Co. v. Conway, 279 U. S. 813, 34 Fed. (2nd) 47 1

Oliver Mining Co. v. Lord, 262 U. S. 172, 176 28

Pennsylvania, Bell's Gap R. Co., v., 134 U. S. 232, 237 30

Pennsylvania, Quaker City Cab Co. v., 277 U. S. 389, 400 ..... 35, 41

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 400 ..... 35, 41

Raymond v. Chicago Union Trac. Co., 207 U. S. 20, 36 30

Royster Guano Co. v. Virginia, 253 U. S. 412, 415 .. 26

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 445 30

Southern Ry. Co. v. Green, 216 U. S. 400, 412 41

Stone, Louisville Trust Co. v., 107 Fed. 305 30

Sunday Lake Iron Co. v. Wakefield Tp., 247 U. S. 350, 353 ..... 29, 30, 41

Taylor, N. C. & St. P. R. Co. v., 86 Fed. 168 30

United States Code, Title 28, Sec. 380 2

Virginia, Royster Guano Co. v., 253 U. S. 412, 415 26

Wakefield Tp., Sunday Lake Iron Co. v., 247 U. S. 350, 353 ..... 29, 30, 41

Yick Wo v. Hopkins, 118 U. S. 369 41

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E. A. CONWAY, SUPERVISOR OF PUBLIC ACCOUNTS OF THE STATE OF LOUISIANA.

ORIGINAL BRIEF FOR APPELLANT.

The opinion of the court below will be found reported in *34 Fed. (2nd) 47* (R. 65, *et seq.*)

The case was before this Court at its last term on appeal from a decree refusing an interlocutory injunction. The Court then *(279 U. S. 813)* reversed the decree appealed from, with direction to the District Court to issue an interlocutory injunction on terms. That injunction was accordingly issued (R. 20).

This appeal is from a decree dismissing plaintiff's bill on final hearing. That decree was rendered on August 9, 1929 (R. 70), and supersedeas was allowed on August 20, 1929, with continuation of the injunction pending the appeal (R. 71).

That this Court has jurisdiction of the present appeal is clear *(Section 380, Title 28 of the United States Code)*, since the jurisdiction of the District Court was invoked to enjoin the operation of a State statute as violative of the equal-protection clause of the Fourteenth Amendment (R. 6, 7).

STATEMENT OF THE CASE.

This suit is to prevent the enforcement against the plaintiff of a statute of Louisiana (Act 5 of 1928), amending a prior statute (Act 140 of 1922), imposing a severance tax upon the production of oil as a natural product of the soil. The prior act fixed the tax at three per cent of the market value of the oil at the time and place of severance[1]. The amendatory act marked a radical departure from the practice theretofore in force in Louisiana and in the other States[2] by the imposition of a tax ranging from four to eleven cents per barrel, upon a schedule based upon no other standard than that of gravity or comparative weight.

For the purposes of this tax the statute[3] divides all oils produced within the State into six classes, in which

---

(1) See Gulf Refining Co. v. McFarland, 154 La., 251, 264 U. S. 573.
(2) See Appendix, page 53.
(3) See Appendix, page 47.

classification no account is taken of any property of the oil except its gravity, and imposes taxes upon each as follows:

4 cents on all oil of 28 degrees gravity or below;
4¼ cents on oil over 28 and not over 31 gravity;
5 cents on oil over 31 and not over 32 gravity;
8 cents on oil over 32 and not over 36 gravity;
10 cents on oil over 36 and not over 43 gravity; and
11 cents on oil above 43 degrees gravity.

As applied to the plaintiff's operations, the increase in its tax resulting from the amendatory act for the eight months subsequent to the effective date of the statute was 110 per cent, or $26,954.19 (R. 39). The net result of the act is to impose widely varying burdens upon producers of oil in different sections of the State; the rate of tax upon the plaintiff, in North Louisiana, being twice that exacted of producers of oil in South Louisiana (R. 68), whose taxes are raised on an average of less than 10 per cent.

While admitting the validity of the prior act and declaring its willingness and readiness to pay the tax imposed thereby, the plaintiff alleges that the changed and enlarged tax imposed by the amendatory act is invalid, in that the act, as applied to the plaintiff's operations, contravenes the equal-protection clause of the Fourteenth Amendment to the Constitution of the United States, and also a provision of Section 21 of Article X of the Constitution of Louisiana requiring that severance taxes be predicated upon either the quantity or value of the product at the time and place of its severance.

In its former opinion *(279 U. S. 813)* this Court disposed of the application for an interlocutory injunction

on the ground that the constitutional questions involved depended upon controverted questions of fact:

> "The application for an interlocutory injunction was submitted on *ex parte* affidavits, which are harmonious in some particulars and contradictory in others. The affidavits, particularly those for the defendant, are open to the criticism that on some points mere conclusions are given instead of primary facts. But enough appears to make it plain that there is a real dispute over material questions of fact which cannot be satisfactorily resolved upon the present affidavits, and yet must be resolved before the constitutional validity of the amendatory statute can be determined."

These questions of fact were directly presented through the issue tendered by the bill (R. 6, 7) and categorically denied in the answer (R. 14) that the statute effected a discrimination against the plaintiff in favor of other producers similarly situated; and through the further allegation that such discrimination was the direct and proximate result of the standard or basis of classification adopted by the statute (R. 6, 7), which the answer (R. 14) denies. Indeed, the answer goes farther and in detail attempts to show (R. 15) that taxation according to gravity is substantially a tax according to value.

It was upon these questions that the statements in the affidavits before the Court on the former hearing were contradictory, thus presenting issues of fact which the Court held necessary to be resolved by evidence.

Upon these issues the case went to trial in the District Court, and upon them oral testimony was heard and

a large volume of documentary evidence introduced. Of the evidence, oral and documentary, it may fairly be said that no serious dispute exists upon these two material questions of fact.

While the judgment of the District Court dismissed the bill, that court did find as facts:

> *First*, that the tax levied upon the plaintiff in respect of oil produced by it, ranged from 60 to 100 per cent more (R. 68) than the tax imposed upon other producers;
>
> *Second*, that gravity "has a definite relation to value of oil of comparatively the same properties" (R. 69).
>
> *Third*, that there are oils of higher gravity which are worth less, though taxed higher, than other oils of lower gravity (R. 67, 68), thus demonstrating that gravity is not a common index of comparative values;

Despite which findings of fact the court sustained the statute, upon the grounds (R. 69):

First, that "the tax need not operate equally throughout the State, provided it is equal as to all persons within a particular district;"

Second, that "gravity is one means of identifying all oil, is universally used by the trade, and has a definite relation to value in oil of comparatively the same properties;"

Third, that the inequality of taxation resulting from the statute "does not render the classification made by Act 5 of 1928 so unreasonable as to infringe the Fourteenth Amendment;"

Fourth, that the law is not "intentionally discriminatory, and the tax bears equally upon all persons producing the same quality of oil."

From the decree rendered pursuant to that opinion, this appeal is prosecuted.

ASSIGNMENT OF ERRORS.

It is assigned as error (R. 71) that the District Court erred:

(1)

In holding that Act No. 5 of the Louisiana Legislature of 1928 is not violative of the provisions of Section 21 of Article X of the Louisiana Constitution, requiring severance taxes to be predicated upon either quantity or value.

(2)

In holding that Act 5 of 1928 of the Louisiana Legislature is not void in denying to complainant the equal protection of the laws, guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(3)

In holding that the severance tax imposed by Act 5 of 1928 is levied according to quantity.

(4)

In holding that the classification by gravity attempted by said Act 5 of 1928 is not unreasonable and arbitrary.

(5)

In not holding that gravity is no indicium of relative value, utility or content with respect to the oils produced in Louisiana generally, and therefore is entirely an arbitrary method of classification.

(6)

In holding that a classification of oil for the purpose of the imposition of severance taxes at varying specific rates is permissible under Section 21 of Article X of the Constitution of Louisiana.

(7)

In not holding that the basis of classification attempted by said Act 5 of 1928, namely the gravity of the oil produced, necessarily results in an arbitrary, unreasonable and oppressive discrimination against this complainant.

(8)

In not holding that the classification of all oil produced in Louisiana according to gravity and the imposition of different specific taxes upon each such attempted class is justified by no ground of difference bearing a reasonable and just relation to the equal protection of the laws guaranteed by the Fourteenth Amendment.

(9)

In not holding Act 5 of 1928 to be void, as violative of the Fourteenth Amendment, because of the proof that its system of imposition of severance taxes upon oil is of

such character that substantial equality will not result from its operation.

(10)

In not holding the method of graduation of specific taxes upon crude oil of different gravities by Act 5 of 1928 to be so unreasonable as necessarily to result in arbitrary discrimination which particularly affects the plaintiff.

(11)

In not holding that the discriminations effected by Act 5 of 1928 were and are intentional.

(12)

In holding that the Legislature may, consistently with the equal-protection clause of the Fourteenth Amendment to the Constitution of the United States, impose severance taxes upon producers of oil in North Louisiana (where plaintiff operates exclusively) substantially greater than upon those engaged in the identical business in South Louisiana.

(13)

In not holding the provisions of said Act 5 of 1928 imposing a severance tax on oil to be violative of the Fourteenth Amendment to the Constitution of the United States, in view of the proof that the plaintiff is thereby subjected to a burden of taxation excessive and unreasonable as compared with that levied upon other persons engaged in the same occupation, as the direct result of the

varying of the tax according to arbitrary standards fixed in said act.

STATEMENT OF POINTS TO BE RELIED UPON.

As required by paragraph 9 of Rule 11, the appellant has here filed (R. 101) its statement of points to be relied upon, condensing and summarizing its specification of errors:

POINT I.

Act 5 of 1928 of the Louisiana Legislature is void because it denies the plaintiff the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, in that:

(a)

The statute in question operates a systematic and oppressive discrimination against appellant.

(b)

The discrimination effected by the statute rests upon no reasonable basis of classification.

POINT II.

Act 5 of 1928 of the Louisiana Legislature is void as in conflict with Section 21 of Article X of the Constitution of Louisiana, in that:

(a)

The severance tax imposed by the statute in question is levied neither according to quantity nor to value.

(b)

Whatever of classification is attempted by the act is arbitrary and unreasonable.

SUMMARY OF ARGUMENT.

(1)

The proof clearly establishes that the direct and necessary effect of the statute is a gross discrimination against the plaintiff in its burden of taxation as compared to others in the same business. This also appears in the findings of fact of the lower court (page 12).

(2)

The record likewise establishes that gravity has relation to value or quality only as between similar oils of substantially similar composition. This also appears from the findings of fact of the District Court (page 20).

(3)

The classification under the statute, resting not upon quality or composition of the oil, nor upon its utility or value, nor upon any basis other than that of weight, is therefore unreasonable and arbitrary (page 26).

(4)

The classification adopted by the statute necessarily effects a clear and hostile discrimination against the complainant, because of the arrangement of its schedule and of the rates thereunder levied (page 33).

(5)

Settled principles, established by decisions of this Court, compel the conclusion that the judgment of the District Court is erroneous under the facts as found by that court (page 40).

(6)

The statute in controversy is violative of Section 21 of Article X of the Constitution of Louisiana, in that the tax is levied neither according to quantity nor to value, and rests upon an arbitrary classification (page 43).

ARGUMENT.

POINT I.

Act 5 of 1928 is void, because it denies the plaintiff the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

(a)

The statute operates a systematic and oppressive discrimination against the appellant.

The facts, as conclusively proved on the final hearing, corroborate in every particular the statements made in the affidavit furnished on behalf of the plaintiff on the rule for an interlocutory injunction. No serious effort was made to combat this proof. The District Court finds as a fact (R. 68) a variation in the tax burden imposed

upon producers of oil within the State, to the prejudice of the plaintiff, of 100 per cent. This finding only touches the actual facts. The witnesses for both sides concede the correctness of the prices quoted in the trade journals offered in evidence (R. 53, 54, 63, 64, 79, 80 and 81). Indeed, the exhibit shown on pages 53 and 54 is made part of the answer of the defendant in this case (R. 16). The quotations shown in this exhibit (R. 54), taken in connection with the statement as to the oils produced by the plaintiff (R. 22 to 38), show that the tax levied upon the plaintiff, under the schedule of prices then existing, was as follows:

The Ohio Oil Company produced in the Haynesville field oil of gravity ranging from 33 to 36. Such oil was quoted at an average price of $1.22. It was taxed at the rate of 8 cents per barrel, or at the rate of over 6½ per cent of its value.

It produced oil in the Cotton Valley field, practically all of which fell into two classes: the first between 28 and 31 gravity, selling at $0.75 a barrel, on which the tax was 4¼ cents, or 5⅔ per cent; the second above 43 gravity, selling at $1.76 per barrel, on which the tax was 11 cents, or a fraction over 6 per cent.

It produced in the Pine Island field, in Caddo Parish, oil from 37 to 41 gravity, quoted at an average price of $1.34, and taxed at 10 cents a barrel, or almost 7½ per cent.

It produced in the Urania field oil of a gravity below 28, selling at a flat price of $0.75 a barrel, and taxed at 4 cents, or 5⅓ per cent.

On the other hand, producers of oil in the Vinton, Edgerly and Stark's Dome fields sold their oil (all of which was below 28 degrees in gravity) at a flat price of $1.30, on which they paid a tax of 4 cents a barrel, or 3.1 per cent. Likewise, the producers in the Bellevue field sold their oil at a flat price of $1.25, paying a tax of 4 cents a barrel, or 3⅓ per cent; while those in the Jennings field marketed their oil at $1.15 a barrel, paying a tax of 4 cents, or a fraction less than 3½ per cent. And it likewise is true that, with respect to the other fields of South Louisiana not quoted in the exhibit mentioned, the prices, the tax and the rate of taxation were substantially the same. See Exhibit "B", insert between pages 42 and 43. The official report of the Louisiana Conservation Commission (R. 52) shows that these fields produced in 1928 nearly one-third of the oil of the State.

As a consequence it is undisputed that, while, under prices prevailing at the date of the filing of the suit, plaintiff was taxed upon its production at from 5⅓ to 7½ per cent, the producers of nearly one-third of the oil in Louisiana were taxed at less than 3.5 per cent.

The same degree of discrimination is shown by the prices quoted in the trade journals in the transcript as prevailing at other dates.

The record also contains other evidence in official form, not disputed by either side, from which it is demon-

strated that the gross inequality shown to have existed at the date of the filing of the suit and at the date of the trial was in no sense a sporadic, accidental or occasional one, but a necessary and direct result of the system adopted by the statute under attack. The report of the Conservation Commission of Louisiana (R. 49) gives the average prices of oil prevailing throughout the years 1924, 1925, 1926 and 1927 and at the date of the report, February 21, 1928. As illustrative of the plain discriminatory effect of the statute, we exhibit here calculations showing the rate of tax that would have been imposed upon this plaintiff had Act 5 of 1928 been in effect throughout those years, as well as the rate of tax that would have been imposed upon producers of oil in other fields in Louisiana.

1924:

The Ohio Oil Company would have paid:

Upon its Caddo production.....6.4 per cent;
Upon its Haynesville production....5.8 per cent;
Upon its Cotton Valley production..5.7 per cent;

whereas the producers of coastal oil, all of which is of a gravity much lower than that prevailing in any of the fields above mentioned, would have paid 2.5 per cent.

1925:

The Ohio Oil Company would have paid:

On its Caddo production.....5.1 per cent;
On its Haynesville production.....5.0 per cent;
On its Cotton Valley production....4.6 per cent;

whereas the producers of coastal oil would have paid 2.4 per cent.

1926:

In spite of the fact that in this particular year prices of high-gravity oil reached their peak, plaintiff would have paid:

On its Caddo production.....4.5 per cent;
On its Haynesville production.....4.1 per cent;
On its Cotton Valley production....4.1 per cent;

while producers of Coastal "A" oil would have paid 2.6 per cent, and on other grades of coastal oil the tax would have ranged from 2.5 to 2.9 per cent.

1927:

The Ohio Oil Company would have paid:

On its Caddo production.....5.9 per cent;
On its Haynesville production.....5.8 per cent;
On its Cotton Valley production, a fraction over 5 per cent.

All producers of oil in the coastal fields of South Louisiana, however, would have paid on "A" grade oil 3.1 per cent, and on the remainder at rates running from 3.0 to 3.2 per cent.

1928:

On February 21, 1928, The Ohio Oil Company would have paid:

On its Caddo production.....6.5 per cent;
On its Haynesville production.....6.8 per cent;
On its Cotton Valley production...6 2/3 per cent.

At that date producers of coastal "A" oil would have paid 3.3 per cent, and on the remaining grades of Coastal oil a

practically uniform burden of 3.4 per cent would have been imposed.

Based upon an average of the prices prevailing during the whole of these periods, the plaintiff would have paid:

On its Caddo production.....5.7 per cent;
On its Haynesville production.....5.4 per cent;
On its Cotton Valley production....5.1 per cent.

The average burden for such period upon producers of coastal oils would have ranged from a fraction under 2.8 per cent on Coastal "A" and 3.2 per cent on Coastal "B" to a practically uniform burden of 3 per cent on coastal light oils.

Thus it will be seen that the proof as to the burden upon producers of oil in the Caddo, Haynesville and Cotton Valley fields for the entire period covered by this report, as compared with that upon the producers of Coastal "A" oil, shows practically the same proportion of discrimination as that which existed for the period between the effective date of the statute and the date of the trial, to-wit, a tax upon the plaintiff of 100 per cent more than that imposed upon its competitors in the coastal fields.

In these calculations we have omitted Urania, because of the fact that it began to produce only in 1926, but the tax upon the plaintiff as a producer of that oil (similar in every respect to Coastal "A" oil) (R. 79, 89) would have ranged from 3.1 per cent in 1926 to 4.3 per cent in

1927 and 5 1/3 per cent on February 21, 1928, as compared with 2.6 per cent in 1926, 3.1 per cent in 1927 and 3.3 per cent on February 21, 1928, on oil identical with it in gravity and composition produced in the coastal fields.

The Bureau of Mines, in its "Information Circular 6114," entitled "Survey of Gravities of Domestic Crudes" (R. 63, 64), has compiled a statement disclosing the market prices of oils produced in the various Louisiana fields on the first day of July in the years 1926, 1927 and 1928, together with the gravity of each of such oils. If Act 5 of 1928 had been in effect at these dates, the rate of tax that would have been imposed upon the complainant would have been as follows:

July 1, 1926:

Caddo production ..... 4.0 per cent;
Haynesville production ..... 3.9 per cent;
Cotton Valley production ..... 3.5 per cent;

whereas the burden upon the producers of coastal oils would have been only 2.5 per cent. The rate of tax upon Urania oil would have been 3.4 per cent.

July 1, 1927:

The Ohio Oil Company would have been taxed:

On Caddo production ..... 7.3 per cent;
On Haynesville production ..... 7.3 per cent;
On Cotton Valley production ..... 4.25 per cent;
On Urania production ..... 4.0 per cent.

Producers of Coastal "A" oils would have paid 3.3 per cent; producers of other coastal oils 3.4 per cent.

July 1, 1928:

The Ohio Oil Company would have paid:

On Caddo production.....7.1 per cent;
On Haynesville production.....6.4 per cent;
On Cotton Valley production.....5.7 per cent.

Producers of Coastal "A" oil would have paid 3.3 per cent, and producers of other coastal oil 3.4 per cent. On its Urania production plaintiff would have paid 5.3 per cent.

So that, taking a range of years, we find uniformly resulting from the application of the schedules of Act 5 of 1928 a discrimination of a most peculiar and unusual character against operators in the Caddo, Haynesville and Cotton Valley fields in respect of the burden imposed upon them, as compared with that imposed upon other persons engaged in identically the same occupation in other portions of the State.

It therefore is clear that this plaintiff (in a business established long before the passage of the statute), in the parishes of North Louisiana, wherein it has investments totaling many millions of dollars (R. 75), is compelled to pay a tax 100 per cent higher than that exacted of other persons following the same occupation in other portions of the State; or, to state it conversely, persons and corporations in South Louisiana, in competition with the plaintiff in the same business, are taxed upon their oil, or upon its severance from the soil, one-half of what the State exacts from the plaintiff for pursuing the same occupation.

This fact, proved without attempted contradiction, furnishes the answer to the first question of fact upon which this Court remanded the case for trial.

And it is clear under the decisions that, if such discrimination is not a casual or accidental result of the operation of the act, but is its direct and necessary effect, the act denies the equal protection of the laws, guaranteed by the Federal Constitution to all of the citizens of each State.

That right is one of substance; it cannot be denied by technical manipulation or by any mere form of words; it does not admit of partial application; it is coextensive with the boundaries of the State. And that right, having the sanction of the organic law, cannot be taken away from the citizen by any legislative fiat or by the mere use of the term "classification."

(b)

The discrimination effected by the statute rests upon no reasonable basis of classification.

Since the differentials in the tax exacted by the statute rest upon a classification based entirely upon the gravity of the oil, the question is whether the record shows such classification unreasonable.

I.

A tax according to gravity is unreasonable and arbitrary.

The term "gravity" as used in the oil business is the converse of specific gravity; that is to say, the Beaume gravity scale, referred to by the statute, is a measure of lightness rather than of weight, the gravity increasing as the weight decreases (R. 66).

Crude petroleums in general are of three kinds; those having a paraffine base, those having an asphalt or naphthene base, and those with a mixed base. The only paraffine-base oil produced in Louisiana is in the northern portion of the State. South Louisiana produces principally asphalt-base crude, with some mixed-base; while North Louisiana produces, besides paraffine-base oils, also asphalt-base and mixed-base petroleums (R. 77, 85, 86; see also R. 48, 63, 64).

In the year 1928, according to the figures furnished by the Louisiana State Department of Conservation (R. 52), the production of oil in Louisiana was, in round figures, 22,000,000 barrels, of which a fraction over two-thirds was produced in North Louisiana and a little under one-third in South Louisiana. Deducting from the North Louisiana production that of the Bellevue, Elm Grove and Urania fields, shown by the record (R. 78) to be of asphalt base, and without any allowance for the mixed-base oils of the Pine Island field in Caddo Parish (R. 78), these statistics show that the paraffine-base oils constituted very little over one-half of the total amount of oil extracted in the State.

Figures in evidence and undisputed (plaintiff's Exhibit "B", inserted between pages 42 and 43; also see R. 83) show that less than two-thirds of the oil produced in North Louisiana at the date of the trial was sold on a gravity basis, and over one-third at flat prices unaffected by gravity; while in South Louisiana more than half of the production fell into Grade "A" and a little less than half into Grade "B", the former selling entirely at flat prices, the latter partly at flat prices and partly on a gravity schedule

(see R. 141) entirely different from the schedule in effect as to light oils produced in the fields of North Louisiana.

Prior to the discovery of the process of cracking oil, the asphalt-base crudes were used almost entirely for the manufacture of lubricants and the residuum for fuel oil; but now, as stated by the District Court, gasoline is extracted from them by the process known as cracking (R. 66). The paraffine-base crudes have always been used for the distillation of gasoline, kerosene and the lighter petroleum products (R. 66). And though gasoline and kerosene may be extracted from any of the crudes produced in Louisiana, the asphalt-base crude known as Grade "A" has a peculiar value for the manufacture of lubricants (R. 66). This value of asphalt-base oil as a lubricant base is measured, not by gravity, but, as stated by the District Court, by viscosity and freedom from sulphur content (R. 67); the proof showing that, as a matter of fact, the value for lubricant stock tends to increase as gravity decreases (R. 79, 81).

Paraffine-base oils contain usually a large proportion of gasoline recoverable by simple distillation (R. 77), the lightness of this kind of oil being due to the presence of the free gasoline and other lighter products (R. 47, 85, 87). The record leaves no doubt that the adoption of the gravity system for the quotation of prices of paraffine-base oils is due primarily, if not entirely, to the fact that, roughly, the gravity, as between paraffine-base oils produced in the same field, indicates the percentage of gasoline recoverable by distillation (R. 77, 78, 79, 85, 87, 88). But, as between paraffine-base oils from different districts or

from different sands, gravity is not an index of relative gasoline content (R. 78, 85, 87, 88). The fact that two oils are of the same specific, or the same Beaumé, gravity does not indicate that they are of equal value or of comparatively equal gasoline content, because one oil may be practically uniform in its aggregates, while another may be a combination of a heavier and a lighter oil. This commonly occurs, and in such case the two crudes will yield different products, resulting in radically different values (R. 78).

In the circular No. 6114 of the Bureau of Mines, of date April 9, 1929 (R. 45 *et seq.*), it is said:

> "In general, the higher the gravity the higher the gasoline yield. However, no definite rule can be laid down as to the increment to be expected in gasoline percentage recovery for each degree rise in gravity. This is because of differences in chemical composition which, in addition to affecting gasoline recovery by means of its relation to gravity, also exerts an effect which is distinct from gravity. * * * The gravity basis as now used by the crude buyers in most fields is an attempt to make allowance for the higher gasoline content of high-gravity crudes, * * *"

This is recognized by the District Court (R. 67) in its finding that "gravity * * * has a definite relation to value in oil of comparatively the same properties."

Conclusive evidence that gravity is of importance only as between oils produced from the same fields or districts, and therefore of the same origin and composition, is afforded by the price quotations contained in the record.

For example, the quotations in the Oil Weekly of May 25, 1928 (R. 53 *et seq.*), which are referred to and made part of the answer of the defendant in this case (R. 16), show that in many fields oil is sold at flat prices unaffected by gravity, but that, where a gravity schedule is used, there is a different gradation in price in each particular district, 18 different gravity schedules prevailing in California alone. The prices current at the time of the trial, shown by the quotations (R. 63 *et seq.*), disclose 20 different gravity schedules for California, 6 different gravity schedules for Texas, a number of other gravity schedules for other sections of the country, the pricing of oils in the various fields of the eastern and central States by flat prices in each field unaffected by gravity, a flat price on Gulf Coastal "A" oil, a gravity schedule on Gulf Coast light oil entirely different from that in force in North Louisiana, and the latter schedule confined entirely to the Homer, Haynesville, Caddo, El Dorado, De Soto, Crichton and, partly, Cotton Valley fields (R. 64), these fields being closely connected and producing similar oils from similar sands (R. 78).

The record, therefore, demonstrates that, with respect to a very large proportion of the oil produced in Louisiana, gravity plays no figure in the fixing of prices; that whatever gravity schedules exist grow out of an attempt to fix comparative values of similar oils for distillable gasoline; and that the schedules prevailing in South Louisiana are entirely unrelated and irrelevant to that in force in North Louisiana. It seems clear, therefore, that

the action of the Legislature in adopting as a basis for the admeasurement of a tax to be imposed upon all oil in Louisiana, a standard not common to all was arbitrary and unreasonable.

The defendant has never contended, either in his answer, in his affidavits to the rule for an interlocutory injunction or on final hearing, that gravity was adopted as a classification base for any reason other than as a rough measure of value. It is not contended in pleading, in affidavit or in evidence that differences in gravity form a basis for classification except upon the assumption that such gradations in gravity indicate gradations in value. So, the answer states (R. 15):

> "The gravity of oil severed from the soil is almost wholly controlling on the question of its value."

To the same effect were the long affidavits tendered by the defendant, and mentioned by this Court in its previous opinion as dealing with conclusions only. The principal witness for the defendant testified (R. 91) that all oil, practically, has been sold in Louisiana upon a gravity basis; that at practically all times oils of 28 gravity and below have sold more or less for the same price, whether in North or South Louisiana; that above 28 gravity, oils are sold on a gravity basis; and that this statement is borne out by the quotations in the oil trade journals. The witness testifies (R. 93), squarely contrary to the facts as found by the District Court (R. 67, 68), that there is nothing in the statute levying a higher tax upon oil of a lower

value than upon oil of a higher value; and that (R. 94) he himself worked out the schedule in the statute "so that it might accord more or less with the worth of the oil." So, throughout all the record, the contention of the defendant is and has been that a classification by gravity is substantially a classification by value. Neither on the former trial here nor in the District Court were the market prices of oil in the various fields controverted questions, nor the facts as to the production of the plaintiff in the fields in which it operates. The only disputed question of fact, before and now, arose out of the defense tendered that the classification and gradation adopted by the statute did not operate as a violation of any constitutional right of the plaintiff, because in a general manner the values of oils produced in Louisiana were determined by their gravity, and that the practical effect of the statute was a rough approximation of equality in taxation; such approximation being, admittedly, all that is required under the equal-protection clause of the Fourteenth Amendment.

This disputed question of fact was one which this Court said on the former hearing "must be resolved before the constitutional validity of the amendatory statute can be determined."

The evidence adduced below, as we have heretofore attempted to point out, demonstrates to a finality that gravity in no respect enters as a common measurement into the ascertainment of the relative values of oils produced within Louisiana, and that the selection of gravity as the basis of such admeasurement ineluctibly leads to a systematic discrimination against the producers in the fields in which this complainant operates.

If gravity, therefore, is not a common measure of value as between oils of different composition, there could be no more justification for its use in the measurement of the tax on all oils generally than there could be for the use of either the passenger-mile base or the ton-mile base for determining a common rate for both freight and passenger tariffs. See *Love v. A., T. & S. F. R. Co., 185 Fed. 321, 329*, cited by this Court in its former opinion.

For of course it is settled law that, broad as is the power to classify, any classification must, to meet the test of the Fourteenth Amendment,

> "be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."
>
> *Royster Guano Co., v. Virginia, 253 U. S. 412, 415*, and cases there cited.

Nor is it enough for the State to point out merely that the oils are of different gravities, that is, of different weights. It is necessary that there be in that fact some reason for using that difference as a basis for such a classification as will operate plain discrimination in the burden of taxation.

> "That is to say, **mere** difference is not enough. The attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect of which the classification is imposed, and can never be made arbitrarily and without any such basis.' Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 150, 155."
>
> *Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 37.*

Manifestly the Legislature could not have taken a mere accidental quality, such as the color or the smell of oil as the basis for grading or classification. Likewise, to select for that purpose that which means nothing except relative weight is equally as arbitrary; for of course nothing can serve as a basis of classification that is not relevant either to value, to utility, to profit or to some end or purpose of sound public policy, where the direct result of its use is the imposition of materially variant tax burdens on persons similarly situated.

The constitutional provision under which authority for this legislation is claimed, *Section 21 of Article X of the Constitution of Louisiana*, provides:

> "Taxes may be levied on natural resources severed from the soil or water, to be paid proportionately by the owners thereof at the time of severance."

The Constitution speaks of the tax as one upon the product. The levy before the Court is not based upon the value nor upon gross receipts. The statute expressly says that it levies

> "a tax upon all natural resources severed from the soil or water * * * such as oil, * * *."

Section 2 of the act declares:

> "Taxes on natural resources severed from the soil or water * * * shall be predicated on the quantity severed, and shall be paid at the following rates: * * *"

Under this section appears a levy, not upon producers of oil, but upon the oil produced, and graded under the six classifications made by the act.[1]

In any event the statute levies either a tax upon the product or an excise upon the exercise by the operator of his right of severance of the mineral from the soil. In either case the burden of the tax falls entirely upon the producer; the incidence of the tax is wholly upon his operations. For all substantial purposes, whatever theoretically may be the nature of the tax, it is one upon the product. But if considered as a tax upon the operation of extracting the oil, the evidence discloses without dispute that the business of producing oil is the same throughout the State; there being neither in respect of machinery, of labor, of expenditures, of methods of operation nor of depth of wells (R. 77, 82) any difference between the business or the operation of producing oils of different gravities, whether in North or in South Louisiana. Whether, therefore, the tax be considered in its ultimate aspect as one upon the product, or as an excise upon the business of the operator, the record wholly fails to point out a justification for the imposition of a tax upon this complainant 100 per

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[1] In this respect the statute is entirely different from the one before the Court in Choctaw, Oklahoma & Gulf Ry. Co. v. Harrison, 235 U. S. 290, and in Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 176, wherein the tax was of a percentage on the gross receipts, or of the gross value of the product. Likewise it differs from Gulf Refining Co. v. McFarland, 154 La. 251, 264 U. S. 573.

In the latter case, the controlling question was not whether the tax was an excise or a property tax, but whether Act 140 of 1922, imposing a severance tax of 3 per cent of gross value, was violative of Section 3 of Article X of the Louisiana Constitution, limiting the rate of taxation. The answer of the State Supreme Court was that Section 21, specially authorizing the severance tax, freed this form of taxation from the general limitation imposed by Section 3 upon the taxing power.

cent greater than that exacted of other producers in other fields of the State.

> "The application of the equal-protection clause does not depend upon what name is given to the tax."
>
> *Louisville Gas & Elec. Co. v. Coleman, 277 U. S. 32.*

The case is controlled by fundamental principles:

As concisely stated in *Sunday Lake Iron Co. v. Wakefield Township, 247 U. S. 350, 353:*

> "The purpose of the equal protection clause of the 14th Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."

If the State law were in the form of a general property tax, and the assessing authorities had proceeded to value the properties of the various producers in the State, not according to their value, but according to the gravity of the oil produced, the same concrete result would have been reached as in this case; and it is settled law that in such a case relief would be granted because of the violation of the equal-protection clause of the Fourteenth Amendment occasioned by such act.

This Court has been vigilant in affording relief to the taxpayer against such administrative acts whenever

> "there exists, in respect to the property of complainant and others similarly situated, a systematic, intentional and illegal undervaluation of other prop-

erty by the taxing officers of the state, which necessarily effects an unjust discrimination against the property of which the plaintiff is the owner, and a bill in equity will lie to restrain such illegal discrimination, and in such cases Federal jurisdiction will arise because of the equal protection of the laws guaranteed by the 14th Amendment."

Raymond v. Chicago Union Traction Co., 207 U. S. 20, 36, and cases there cited;

Sunday Lake Iron Co. v. Wakefield Twp., 247 U. S. 350, 353;

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 445;

See also *N. C. & St. P. R. Co. v. Taylor, 86 Fed. 168;*

Louisville Trust Co. v. Stone, 107 Fed. 305.

A fortiori, when the arbitrary discrimination is not the act merely of administrative officials, but the immediate result of a direct mandate of the legislature, it is clear that the injured taxpayer has been denied by the State the equal protection of the laws.

Louisville Gas & E. Co. v. Coleman, 277 U. S. 32, 37;

Martin v. District of Columbia, 205 U. S. 135, 139;

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237.

In view of the facts, it is manifest that the classification by gravity has no more reason upon which to rest than that considered and condemned in *Airway Appliance Corporation v. Day, 266 U. S. 71, 80,* in which this Court held to be void a tax laid upon foreign corporations based

only upon the number of authorized shares of stock. In that case the Court said (page 85):

> "It is clear that the mere number of authorized non-par-value shares is not a reasonable basis for classification of foreign corporations for the purpose of determining the amount of such annual fees. Such classification is not based on anything having relation to the purpose for which it was made. Southern R. Co. v. Green, 216 U. S. 400, 417; F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, 415. The act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application. Martin v. District of Columbia, 205 U. S. 136, 139; Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S. 55, 58; Kansas City Southern R. Co. v. Road Imp. Dist., 256 U. S. 658, 660. The act violates the equal protection clause of the 14th Amendment."

For, despite any argument that can be made, the stubborn fact persists that it uniformly has been true throughout all the period covered by the evidence that oils taxed at 4 cents per barrel have been selling for more than oils of higher gravities, when under the statute the latter oils were made to pay a tax much larger than that imposed upon the more valuable oils. Nor does the record admit of any doubt that the plaintiff is compelled by the statute to pay about $40,000 a year more in severance taxes than it would pay if its rate of taxation were the same as that imposed upon producers of a large portion of the oil mined in Louisiana. These facts effectually nullify any argument that gravity is a reasonable method of grading the tax.

(4)

The classification adopted by the statute is unreasonable and arbitrary.

The defense tendered is substantially this: The State has the right to classify for the purposes of taxation; the State has adopted gravity as the basis of classification; gravity is a reasonable classification basis, not because it denotes different kinds or characters of oil, but because it is in general an index of the relative value of oils.

But, if gravity were indicative of the relative value of oils, it would seem that the progression of the tax should have corresponded, roughly at least, to the progression of gravities. But from the fact that such persistent and uniform discriminations as those demonstrated by this record are shown to be inherent in the plan, it must follow that, if there were such relation between gravity and value as is contended for by the defendant, the system of gradation used in the act must in itself be arbitrary.

The discrimination is uncontradicted. The inequality may result from the basis of classification or from the method of gradation. If either be arbitrary, or if their combined result be such as to produce the unusual and hostile discriminations here shown, then necessarily it follows that the statute denies the equal protection of the laws. That, taken together, these two elements do produce such result is beyond question. This is not denied in the opinion of the District Court. On the contrary (R. 68), the opinion exhibits the finding that a difference of 100 per cent does exist in respect of severance taxes imposed upon different producers under the statute here in question.

Whether the plaintiff is denied the equal protection of the laws through the use of the gravity scale or from the arbitrary system of classification thereunder adopted is immaterial. It is enough that the act in its practical effect operates a denial of equal protection. It is immaterial to the plaintiff by what process it is discriminated against; it is enough that the discrimination exists.

The contention of the State is that it is justified in classifying all oils produced within the State according to no other standard than that of gravity; and in so doing, it has arranged all oils for the purposes of taxation into six classes. It treats all oil below 28 degrees gravity as one class, upon which it imposes a flat tax of four cents. All oils between 28 and 31 gravity constitute another class, with a rise in the tax of a quarter of a cent. It places all oils between 31 and 32 gravity as another class, with a rise of three-quarters of a cent in the tax. It then treats oils between 32 and 36 gravity as a separate class, upon which it imposes a tax three cents a barrel or 60 per cent higher than upon the former class. Its next division is of oil between 36 and 43 gravity, upon which it imposes a tax two cents or 25 per cent higher; and above 43 gravity all oil is taxed at 11 cents or one cent higher than the class just below.

The record shows (R. 88) that oils of varying gravities are produced within the same fields from different sands, and even from the same sands (R. 89). Thus oils produced in the same district, and even from the same lease, would fall by the operation of the statute into separate classes paying entirely different and discriminatory rates of taxation. The record contains nothing from which

the conclusion could be reached that an oil of 32 gravity produced in a particular field should pay a tax of 5 cents per barrel, while oil of 32.1 gravity in the same field should pay a tax of 8 cents per barrel; and yet such is the effect of the statute. And so throughout the whole gamut of the so-called classification: the record suggests nothing upon which could be rested a substantial ground of difference between the subject matter of the several classes. The schedule purports, according to defendant, to rest upon differences in value, and yet the arrangement of the progression of the tax is such that the increase in tax, necessarily and systematically, is unrelated to increase in value. The step-up between the first and second classes is of a quarter of a cent within a 3-point gravity range; between the second and third, three-quarters of a cent, with one point difference in gravity; between the third and fourth classes, a 3-cent rise in the tax over a gravity range of four points; between the fourth and fifth classes, a 2-cent rise in the tax, with a 7-point spread in gravity range; and above 43 gravity, all oil, regardless of its value, is taxed at a flat rate of one cent more than oil between 36 and 43 gravity.

It is manifest that there is no relation whatever between the supposed increase in value of oil and its gravity as measured by the step and spread of the tax required by this formula; which, therefore, lacks that reasonableness required to justify a classification through which a discrimination results.

> "The equal protection clause does not detract from the right of a state justly to exert its taxing power, or prevent it from adjusting its legislation to differences in situation, or forbid classification

in that connection; but it does require that the classification be not arbitrary, but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation."

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 400.

An analysis of the facts, as they bear on plaintiff's case, illustrates more clearly the arbitrariness of the so-called classification.

(1)

The act divides all oils into six classes, upon which it levies a tax varying from 4 to 11 cents, according to the class. The first class embraces all oil of 28 gravity and below. The tax on these oils is 4 cents. Their price range, at the date of the filing of the suit, was from $0.75 to $1.30 a barrel (R. 54). The percentage of tax, therefore, within this class varied from 3.1 per cent to 5⅓ per cent.

The Ohio Oil Company, the complainant, produces Urania oil, which, at the date of suit, by virtue of its price, 75 cents (R. 54), paid the highest tax within the class.

Reference to the Conservation Commission Report (R. 49) will show that the average price of Urania crude within the period of years covered by the report was $1.00 per barrel, and that of Gulf Coast "A", $1.42. The average tax that would have been paid by Urania crude, therefore, during the entire period would have been 4 per cent, and by coastal crude, 2.8 per cent.

(2)

No oils within the second class, at the date of the filing of the suit (R. 54), commanded as high a market price as did the Coastal "A" oils in the first class. At the present date, the price range within this class is from $0.85 to $1.33 (R. 64). The tax, therefore, in this class runs from 3 per cent to 5 per cent. It is of interest to note that, outside of the production from the Yount-Lee well, repeatedly spoken of in the testimony (R. 82, 86, 95), there is no oil within this class that brings as high a price as Coastal "A", which is within the first class.

(3)

The third class of oil is taxed 5 cents per barrel. At the date of the filing of the suit, the range of prices within this class was from $0.75 to $1.11 (R. 54). The tax, therefore, varied from 6⅔ per cent to 4.5 per cent. No oil within this 5-cent class brought as high a price as did Coastal "A" oil, which forms the larger portion of the oil falling within the first or 4-cent class.

At the date of trial, the price range within this class was from $0.85 to $1.36 per barrel (R. 64), the tax varying from 3.7 per cent to 5.9 per cent. Within this class The Ohio Oil Company produces the heavy oil of Cotton Valley; the present market value of which is 85 cents, as against $1.30 for Coastal "A" of lower gravity. The rate of taxation on this oil, at the date of the filing of the suit, was 6.6 per cent (its market price was 75 cents,

R. 54), and is now 5.8 per cent, as compared with a rate of 3.1 per cent on Coastal "A" oil, falling within the first class.

A reference to page 123 of the Conservation Commission Report (R. 49) will show an average price on this oil for the period covered by the report of $0.97 per barrel, so that the average rate, had this act been in force, would have been 5.1 per cent as against an average rate of 2.8 on Coastal "A".

(4)

On the fourth class, from 32 to 36 gravity, the tax is 8 cents. The price range within these four degrees, at the date of the filing of the suit, was $1.16 to $1.25 a barrel. (R. 54). **The highest-priced oil, therefore, within this class sold for a smaller price than did the coastal oils, which constituted the bulk of the first class, but paid double the tax imposed on the higher priced oil.** At the present time, the price range is from $1.25 to $1.48 (R. 64), or an average of about the same as that of the bulk of the oil which pays a 4-cent tax.

Within this class The Ohio Oil Company produces oil at Haynesville, the tax on which was 7 per cent at the date of the filing of the suit, and is now 5.4 per cent. The average price on this oil throughout the period covered by the Conservation Commission Report was $1.51 per barrel, which would have resulted in an average tax rate, had the act been in force throughout that period, of 5.3 per cent; the average rate on Coastal "A" being 2.8 per cent.

(5)

Oil of from 36 to 43 gravity is taxed at 10 cents a barrel. The price range, at the date of the filing of the suit, was from $1.28 to $1.46. It will be noted, therefore, that **there was oil taxed at 10 cents per barrel selling for less than the greater part of the oil taxed at 4 cents a barrel.** The present price range is from $1.45 to $1.75 a barrel. Within this class The Ohio Oil Company produces oil at Pine Island in Caddo Parish. At the date of the filing of the suit, its tax rate was 7.9 per cent, and it is now 5.7 per cent.

Page 123 of the Conservation Commission Report shows an average price for the past five years of $1.81, which would have resulted in an average rate of tax, had the act been in force, of 5.5 per cent, or about double the average rate on Coastal "A".

(6)

The price range for the gravities within this class was, at the date of the suit, from $1.49 to $1.76; at the present time, from $1.80 to $1.85. Within this class The Ohio Oil Company produces the light oil of the Cotton Valley district, upon which its tax was, at the date of the suit, 7.4 per cent, and under the readjusted prices, 6 per cent. During the period of the Conservation Commission Report, since the bringing in of the Cotton Valley field, the average price on this oil was $1.76, on which the average tax, had the act been in effect, would have been at the rate of 6.3 per cent, considerably more than double the average rate on Coastal "A" oil.

The record, therefore, demonstrates that, whether due to the use of gravity as a basis of classification or due to the arbitrary method of division into classes, the act works a systematic and hostile discrimination against this plaintiff in favor of others similarly situated, for **at all times higher gravity oils of lower value are burdened with a materially higher tax than oils of lower gravity and greater value.**

Hence, the act "has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its operation."

Airway Electrical Appliance Corporation v. Day, 266 U. S. 71, 80.

It remains briefly to discuss the reasons advanced by the District Court for sustaining the statute in spite of the indisputable facts evinced by the record and of its own conclusions of fact.

THE REASONS ASSIGNED BY THE DISTRICT COURT.

The various reasons advanced by the District Court for sustaining the statute will be found on pages 68 and 69 of the record. It is respectfully submitted that these legal conclusions are inconsistent with settled principles.

On page 68 of the record, the Court, after pointing out that the Louisiana Constitution authorizes the levy of specific taxes on oil severed from the soil, observes:

"Specific taxes must bear some relation to value. Cooley on Taxation, 4th Ed., par. 297. If

> the legislature had taxed all oil at say 4c per barrel the producers of low valued oil would have had just cause to complain. Classification was therefore necessary."

That is to say, the court finds that a tax of a fixed sum per barrel, upon all oil, would have been of doubtful constitutionality, so that it was necessary to classify oil for the purpose of making the tax bear some relation to comparative values; and yet the facts conclusively demonstrate, and the court finds, that, under the classification as made, oils of lower value are systematically taxed at a higher rate per barrel than are oils of higher value. If, therefore, a tax of a fixed sum per barrel as to all oil would have been objectionable, it is apparent that this classification under which higher specific rates of tax levied upon lower-priced oil, is clearly and hostilely discriminatory.

The next reason advanced by the court (R. 69) is that "the tax need not operate equally throughout the State, provided it is equal as to all persons within a particular district." This, of course, states a settled principle applicable to local, special or district taxes. It of course has no application to taxes imposed by the State for State purposes. It would seem unnecessary to cite authorities to clarify the text of the provision of Section 1 of the Fourteenth Amendment to the Federal Constitution which prohibits any State from denying "to any person within its jurisdiction the equal protection of the laws."

A state statute designed to raise taxes for general State purposes throughout the State on all persons engaged in a particular occupation of course presupposes the application to all persons under similar circumstances of substantially equal taxation. The constitutional guaranty of the equal protection of the laws is a pledge of the protection of equal laws.

Yick Wo v. Hopkins, 118 U. S. 369.

Nor may geographical location be used as the basis of classification for the purpose of taxation. Manifestly, the legislature could not in so many words have imposed one tax upon producers of oil in one portion of the State and different and varying rates in other portions of the State. All those engaged in the same occupation are entitled, in virtue of the Federal Constitution, to the equal protection of the laws throughout the limits of the State.

Sunday Lake Iron Co. v. Wakefield Tp., 247 U. S. 350, 353.

If the State may not impose a tax upon a corporation which it does not levy against an individual *(Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389)*, or may not impose upon a foreign corporation which has acquired a domicile and fixed property within the State a franchise tax not exacted of domestic corporations *(Southern Ry. Co. v. Green, 216 U. S. 400, 412)*, it must necessarily follow that, as between concerns pursuing the same occupation within the same State, a discrimination cannot be effected

solely upon the basis of the geographical location of their respective businesses.

The opinion of the District Court rests upon its conclusion that the fact that gravity "is one means of identifying all oil" renders it sufficiently a basis for classification, although comparative gravities have relation to value only in oils of similar composition and origin. It is upon this conclusion that the entire opinion rests. The fact that gravity possessed no relevancy to comparative values in different kinds of oil was, to the court's mind, inconsequential, in spite of its holding of fact that clear discrimination necessarily resulted from the system used.

Suggestions made in the opinion that the Legislature might have used other bases of classification require no discussion. The opinion distinctly holds that the classification was made entirely upon the basis of gravity; and neither in answer nor in brief, either on the former hearing here or below, has it ever been suggested that the Legislature had in mind any basis of classification other than that merely of gravity.

It is respectfully submitted that the record resolves in every particular in favor of the plaintiff every dispute upon the material questions of fact presented by the pleadings and the affidavits; and, hence, that the opinion of the District Court maintaining the constitutional validity of the tax is wrong and should be reversed.

POINT II.

Act 5 of 1928 of the Louisiana Legislature is void as in conflict with Section 21 of Article X of the Constitution of Louisiana.

(a)

The severance tax imposed by the statute in question is levied neither according to quantity nor to value.

Section 21 of Article X of the Louisiana Constitution regulates the power of the Legislature in respect to severance taxes. So much of that article as is pertinent here is as follows:

> "Taxes may be levied on natural resources severed from the soil or water, to be paid proportionately by the owners thereof at the time of severance. Such natural resources may be classified for the purpose of taxation and such taxes predicated upon either the quantity or value of the product at the time and place where it is severed."

The statute states in its title that it is to carry into effect Section 21 of Article X of the Louisiana Constitution of 1921.

It is the contention of the plaintiff that the statute therefore levies the tax neither according to quantity nor to value.

This question as to the power of the Legislature under the State Constitution has never been presented to the State courts, and hence must be here decided as an original question.

Dawson v. Kentucky Distilleries Co., 255 U. S. 288, 296.

It is manifest that the levy here is not according to value. That standard, however, was used in the prior act, under which the tax was three per cent of the gross value of the oil produced.

Gulf Refining Co. v. McFarland, 154 La. 251;
affirmed in *264 U. S. 573.*

Nor does the statute levy a tax of a certain sum per barrel upon all oil produced. And yet the power of the Legislature is distinctly limited to two bases for the levy, i. e., "upon either the quantity or value of the product."

We have already devoted much space to the demonstration of the gross inequality in rates of tax effected by the statute when values are considered. The act itself displays similar inequality in the rate imposed according to quantity. For example, a barrel of oil may be taxed at from 4 cents to 11 cents. The only measure of quantity of oil is the barrel of 42 gallons. And yet the statute directly provides that such quantity of oil shall be taxed, not at a fixed rate, but according to a scale under which the highest tax is almost three times that of the lowest one. Argument can add very little to the force of the demonstration of the plain variance between the terms of the statute and those of the State Constitution unequivocally expressed.

It is plain, therefore, that the only argument that could be advanced in favor of the validity of the statute under the State Constitution would be one based upon the contention that the statute has classified oils according to gravity and has laid a tax according to quantity under each of the classifications thus adopted. This is what the District Court held (R. 68).

(b)

Whatever of classification is attempted by the act is arbitrary and unreasonable.

With respect to defendant's contention, it must of course be accepted as true that the mere use of the term "classification" does not justify discriminatory taxation. The power of the Legislature is limited in this respect to such classifications as are not unreasonable or arbitrary. Whatever classification be adopted must in every case, of course, bear a reasonable relation to the ends, purposes or objects of the legislation. From this standpoint must be tested defendant's contention that the Legislature has divided oils produced within the State into six classes and has levied a different and varying fixed rate of taxation, according to quantity, upon the oil produced within each class.

It is submitted the evidence heretofore discussed clearly establishes the absence of any reasonable relation between such classification and any proper object or purpose of legislative action. Differences in gravity do not reflect differences in value; they do not reflect differences in utility; they do not reflect differences in cost of production; they do not reflect differences of any character except differences in weight. The selection of this incidental property common to all matter, which serves as an index to nothing except relative weight, would seem to demonstrate its own unreasonableness.

And, when the undisputed facts establish that the direct and necessary effect of the levy is to impose upon

higher-gravity oils of smaller value, a tax double the specific sum levied upon lower-gravity oils of higher value, it would seem that the so-called classification is but a screen for clear and hostile discrimination.

If, therefore, the classification be in itself improper, we are confronted with a statute which purports to impose a tax, not according to value, not according to quantity, but according to a new and distinct basis inconsistent with the State constitutional provisions. A statute which levies a tax upon oil severed from the soil, not according to value nor to quantity, but at different specific rates per barrel, according to a standard in itself unreasonable, could not be justified because of the provision of the State Constitution authorizing "classification", for that term always excludes arbitrary selection.

IN CONCLUSION.

It is respectfully submitted, therefore, that the action of the District Court in dissolving the injunction and dismissing the bill was erroneous, and that it should be reversed.

Respectfully submitted,

S. L. HEROLD,
SUMTER COUSIN,
R. L. BENOIT,
Attorneys for Plaintiff.

APPENDIX 1.

ACT 5 OF 1928.

ACT NO. 5.

House Bill No. 89. By Mr. McClanahan.

AN ACT

To amend and re-enact Sections 2 and 5 of Act 140 of 1922, and entitled:

"An Act to carry into effect Section 21 of Article 10 of the Constitution of 1921 by levying a tax upon all natural resources severed from the soil or water; including all forms of timber, turpentine and other forest products; minerals, such as oil, gas, sulphur, salt, coal, lignite, and other ores; also marble, stone, gravel, sand, shells, and other natural deposits; fixing liability for, and prescribing the method of collecting and enforcing the payment of such tax; requiring those engaged in the severance of, and dealing in, such natural resources to make reports of their business as may be necessary for the proper enforcement of this Act; to provide penalties; and to provide for the imposition and payment of the license tax due and to become due under Act 31 of 1920 and other laws, and as herein provided," and to amend and re-enact Section 3 thereof, as amended and re-enacted by Act No. 301 of 1926.

Section 1. Be it enacted by the Legislature of Louisiana, that Section 2 of Act 140 of 1922, entitled:

"An Act to carry into effect Section 21 of Article 10 of the Constitution of 1921 by levying a tax upon all natural resources severed from the soil or water; including all forms of timber, turpentine and other forest products; minerals, such as gas, oil, sulphur, salt, coal, lignite and ores; also marble, stone, gravel, sand, shells and other natural deposits; fixing liability for, and prescribing the method of collecting and enforcing the payment of such tax; requiring those engaged in the severance of, and dealing in, such natural resources to make reports of their business as may be necessary for the proper enforcement of this Act; to provide penalties; and to provide for the imposition and payment of the license tax due and to become due under Act 31 of 1920 and other laws, and as herein provided," be amended and re-enacted so as to read as follows:

Section 2. Taxes on natural resources severed from the soil or water, as levied by Section 1 of this Act, shall be predicated on the quantity severed, and shall be paid at the following rates:

(1) On cypress timber, twenty-six (26) cents per thousand feet, log scale.

(2) On second growth or old field pine timber, seven (7) cents per thousand feet, and on virgin pine timber seventeen (17) cents per thousand feet, log scale.

(3) On ash and hickory timber, twenty-four (24) cents per thousand feet, log scale.

(4) On cottonwood, red gum, magnolia, oak, poplar and sycamore timber, twelve (12) cents per thousand feet, log scale.

(5) On tupelo gum, black gum and sap gum timber, seven (7) cents per thousand feet, log scale, and on all other hard woods ten (10) cents per thousand feet, log scale.

(6) On turpentine, (crude gum), ten (10) cents per barrel of 400 pounds.

(7)a. On oil of 28 gravity and below, four (4) cents per barrel of 42 gallons.

b.(1) On oil above 28 gravity and not above 31 gravity, four and one-fourth (4¼) cents per barrel of 42 gallons.

b.(2) On oil above 31 gravity and not above 32 gravity, five (5) cents per barrel of 42 gallons.

(c) On oil above 32 gravity and not above 36 gravity, eight (8) cents per barrel of 42 gallons.

(d) On oil above 36 gravity and not above 43 gravity, ten (10) cents per barrel of 42 gallons.

(e) On oil above 43 gravity, eleven (11) cents per barrel of 42 gallons.

(8) On gas, one-fifth (1/5th) of one cent (1c) per thousand cubic feet, measured at ten ounce (10 oz.) pressure.

(9) On sulphur, fifteen (15) cents per ton of two thousand pounds.

(10) On salt, four (4) cents per ton of two thousand pounds.

(11) On coal, five (5) cents per ton of two thousand pounds.

(12) On lignite, five (5) cents per ton of two thousand pounds.

(13) On ores, five (5) cents per ton of two thousand pounds.

(14) On marble, ten (10) cents per ton of two thousand pounds.

(15) On stone, one and one-half (1½) cents per ton of two thousand pounds.

(16) On gravel, one and one-half (1½) cents per ton of two thousand pounds.

(17) On sand, one (1) cent per ton of two thousand pounds.

(18) On shells, one and one-half (1½) cents per ton of two thousand pounds.

Section 2. That Section 3 of Act 140 of 1922, as amended and re-enacted by Act 301 of 1926, be amended and re-enacted so as to read as follows:

Section 3. All such taxes shall be collected quarterly by the respective Sheriffs and Ex-officio Tax Collectors of the several parishes from within which the natural resources are severed, and by them shall be paid into the State Treasury as collected, and, unless otherwise herein provided, in the same manner and at the same time as required by law for other state collections.

When so paid into the State treasury, all of the severance taxes collected on oil, gas, salt and shells, not otherwise allocated herein, together with all of the severance taxes collected on all other natural resources severed from the soil or water, shall be credited by the auditor and treasurer to a special fund, which is hereby created to be known as the Severance Tax Fund of the State of Louisiana.

One-fifth (1/5th) of the severance taxes collected on oil, gas, salt, shells, timber, sand, and gravel, is hereby allocated to the parish from which such taxes are collected, and shall be credited to such parish by the auditor and treasurer, provided such allocation and credit shall not exceed Two Hundred Thousand ($200,000.00) Dollars in any parish in any one year. When this limit of Two Hundred Thousand ($200,000.00) Dollars shall have been reached, there shall be no further allocation, and all additional collections for the year shall be credited in full to the Severance Tax Fund hereinbefore created."

That Section 5 of Article 140 of 1922 be amended and re-enacted so as to read as follows:

Section 5. Every person, firm, corporation or association of persons severing any natural resources from the soil or water in this State shall, within thirty (30) days after the expiration of each quarter-annual period expiring, respectively, on the last day of March, June, September and December of each year, file with the Supervisor of Public Accounts a statement under oath, on forms prescribed by him, of the business conducted by such person, firm, corporation or association of persons, during the last

preceding quarter-annual period, showing the kind of natural resources and the gross quantity of each so severed or produced, the names of the owners at the time of severance, the portion owned by each, and such other reasonable and necessary information pertaining thereto as the Supervisor of Public Accounts may require for the proper enforcement of the provisions of this Act. There shall also be shown on such quarterly reports the location of each natural resource and the place or places where produced or severed from the soil or water.

At the time of rendering such quarter-annual report to the Supervisor of Public Accounts, each person, firm, corporation, or association of persons, shall concurrently file a duplicate with the Tax Collector of the parish where said natural resources were taken or severed from the soil or water; and shall pay to said Tax Collector a tax on the gross quantity of each natural resource severed, computed at the rate applying thereto as named in Section two (2) of this Act.

Approved by the Governor: July 7, 1928.

A true copy:

JAMES J. BAILEY,

Secretary of State.

APPENDIX 2.

Taxes upon production of oil are levied by the following States, the tax in every instance being a percentage of the value of the oil produced:

ARKANSAS.

Act 118 of 1923, as amended by Act 142 of 1927.

KENTUCKY.

Act of March 29, 1918, ch. 122, Acts of 1918, page 540.

(See Swiss Oil Corp. v. Shanks, 273 U. S. 407, 409).

MONTANA.

Chapter 266 of Laws of 1921, as amended by Chapter 67 of the Laws of 1923.

NEW MEXICO.

Act of March 17, 1925, ch. 83, Laws of 1925.

OKLAHOMA.

Section 9814, Compiled Statutes of 1921.

TEXAS.

Acts of 1907, page 479, as amended by Acts of 1919, page 128, and Acts of 1923, 2nd C. S., page 98.

WEST VIRGINIA.

Acts of Extra Session of 1925, par. 2-a, ch. 1, page 98. (See Hope Natural Gas Co. v. Hall, 247 U. S., 284, 285).

WYOMING.

Chapter 179, Sections 2906-11, Compiled Statutes of 1923.

No other States impose excises analogous to "severance taxes," although nearly all levy the ordinary *ad valorem* property tax upon the wells or producing properties, using the value of production as a material element in arriving at the assessment.